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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH W. SMITH, JR.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a legal question has arisen, and not yet answered, out of universal concern over the character of the law - - an income tax - - and the questionable subject upon which it legislates currently; that is, an admittedly uncontrollable income redistribution scheme, of which the excessive exaction therefrom questions the enumerated powers of the Federal Government, this seeming exercise of the taxing authority being so arbitrary, and so wanting for classification, as to question whether the exaction is not simply a confiscation of property under the guise of tax.

2. Whether the Court below neglected its judicial function in summarily affirming the United States Tax Court's decision, having disregarded the questions put to it in a manner in conflict with applicable decissions of this Court; and departing so far

from the accepted and usual course of judicial proceeding when two parties are in equity before the law; and having so far sanctioned the departure by three lower courts - - their erroneous decisions pursuant to 26 U.S.C. 7421 and 28 U.S.C. 1346, and pursuant to State v. Rossi 43 A 2d 323, 71 RI 284; (See Reasons for Granting Writ) and regarding respondent's conspiracy to defraud petitioner, pursuant to the provisions of: 26 U.S.C. sections 6213, 7605(b), 6402(a), 6512(a) of the Internal Revenue Code of 1954 - - as to call for an exercise of this Court's power of supervision.

CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
THE STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
Basis for Review	5
U.S. District Court Sanctions	12
"A" The So-called Mathematical Error	12
"B" 26 U.S.C. sections 6402(a) and 6512(a) Indiscretions	13
Improper Tax Lien	15
REASONS FOR GRANTING THE WRIT	17
Urgent Need for Review	17
Property Rights, A Higher Law in Question	21
Subordinated Taxpayers, A Minority Interest	30
Some of the Facts Demonstrating the Bad Faith of Congress	33
The Responsibility of the Judiciary	37

Page

Internal Revenue Service Conspiracy . 45

"A" Injury to Petitioner Through Devious Collection Procedure 45

"B" Coercion and Deceit in the Auditing and Assessment Process 49

CONCLUSION 58

CERTIFICATE OF SERVICE 59

TABLE OF AUTHORITIES

Cases	Page
Botta v. Scanlon, 288 F 2d 504 (1956) . .	4,24
Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916)	5,38,39
Enochs v. Williams Packing Co., 370 U.S. 1 (1962)	49
Flast v. Cohen, 392 U.S. 83 (1968) . . .	29,45
Fuentes v. Shevin, 407 U.S. 67 (1972) . . .	45
Griswald v. Conn., 381 U.S. 479 (1965) . .	24
Linder v. U.S. 268 U.S. 5	45
McCulloch v. Maryland, 4 Wheat. 316 . . .	27
Miller v. Standard Nut Margarine Co. of Florida, 284 U.S. 498 (1932) . . .	4,24
National Foundry Co. of N.Y. v. Director of Int. Rev., 229 F 2d 149 (1956) . . .	4
State v. Rosse, 43 A 2d 323, 71 RI 284 . .	38
Swab v. Doyle, 258 U.S. 529 (1922)	25
Thompson v. U.S. 308 F 2d 634 (1962) . . .	45
U.S. v. Butler, 297 U.S. 1 (1936)	22,28,29,45
U.S. v. Crespo, 281 F Supp 298 (1968) . . .	55
U.S. v. House, 524 F 2d 1035 (1976)	55
U.S. v. Kahriger, 345 U.S. 22 (1953) . .	38,45
West Va. State Board of Education v. Barnette, 319 U.S. 624 (1943)	31
Yannicelle v. Nash, 354 F Supp 143 (1973) .	14

Constitutional Provisions

	Page
Article I, Section 8	3
Article III, Section 2	3
Amendment V, Due Process Clause	3
Amendment IX	3

Statutes

26 U.S.C. section 6213	ii,4,5,7
26 U.S.C. section 6402	ii,4,13,48
26 U.S.C. section 6512(a)	ii,4,13,48
26 U.S.C. section 7421	ii,2,4
26 U.S.C. section 7605(b)	ii,4,40,50,54
28 U.S.C. section 1346	ii,2,4

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, JOSEPH W. SMITH, JR., prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit rendered in these proceedings on December 23, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals appears at Appendix 31-34. The opinion of the United States Tax Court appears at Appendix 1-9. The opinion of the United States Tax Court, on a Motion to Dismiss, appears at Appendix 10-14. The opinions of the United States District Courts for the Southern District of Florida and the District of Oregon appears at Appendix 17-30.

JURISDICTION

The "Memorandum" of the United States Court of Appeals for the Ninth Circuit was entered on December 23, 1980, appearing at Appendix 31-34. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 26 U.S.C. sections 6213 and 7421; and 28 U.S.C. section 1346.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States -

Amendment V:

" . . . nor be deprived of life, liberty,

or property, without due process of law . . ."

Amendment IX:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Article I, section 8:

"The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article III, section 2:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, . . . to controversies to which the United States shall be a party; . . ."

THE STATUTES INVOLVED

26 U.S.C. section 6213 (App.46)

26 U.S.C. section 6402 (App.60)

26 U.S.C. section 6512(a) (App. 60-61)

26 U.S.C. section 7421

> "Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This requirement does not apply to assessments under Subtitle C of the Code; that section of 7421 bars all actions to restrain collection excpet 'where (a) the tax assessment is an illegal exaction in the guise of a tax and (b) there are present 'special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence'. Miller v. Standard Nut Margarine Co of Florida 1932, 284 U.S. 498, 509, 52 S.Ct. 260, 263, 76 L.Ed. 422"; Botta v. Scanlon 288 F 2d 504,505 (1961); National Foundry Co. of N.Y. v. Director of Internal Revenue 229 F 2d 149 (1956) (App. 56-57)

26 U.S.C. section 7605(b) (App.61)

28 U.S.C. section 1346 - U.S. as Defendant:

> (a) The district courts shall have original jurisdiction . . . of:
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

STATEMENT OF THE CASE

Basis for Review:

Petitioner's Tax Court petition complained of a redistribution of income to such an extreme extent that the exaction imposed on petitioner was:

> "taking away my personal liberty in that the amount of income tax I am asked to pay, not income tax per se, is depriving me of essential needs."
>
> "Under the seeming exercise of the taxing power, the taxing statute is so arbitrary as to compel the conclusion that it was not the exertion of taxation, but the confiscation of property, or is so wanting in basis for classification as to produce such a gross and patent inequity as inevitably to lead to the same conclusion." Brushaber v. Union Pacific R.R. 240 U.S. 1, 24-25 (1916)

Congress has provided a procedure by which an aggrieved taxpayer may challenge the legality of a tax. He may decline to pay and have a determination made in the United States Tax Court. 26 U.S.C., section 6213. Being as there are no further specifics, this was the authority petitioner used to get his case before a federal court.

Petitioner declined to pay twenty percent of his 1973 tax. He took deductions from his 1974 tax return not ordinarily allowable, excepting that a "higher law" supercedes in petitioner's case. Petitioner did not pay his self-employment tax for the above reason when he filed his 1974 tax return. This left petitioner with no tax to pay in 1974.

Petitioner strictly conformed to IRS rules by filling in all parts of his two returns being questioned, reporting his income accurately and correctly.

Respondent, at the time, did not agree with petitioner as to his right to withold payment of taxes. (letter from the Direc- of Internal Revenue, App.37)

Explanatory schedules petitioner attached to each of his two tax returns, claiming that the deductions were peti-

tioner's way of challenging the tax on constitutional grounds were of no consequence, as far as respondent was concerned.

However, pursuant to regulations, respondent is required to, and did issue a Notice of Deficiency for 1973 taxes on August 20, 1976. The notice had tacked onto it a negligence penalty.

A fact never fully explained by respondent: petitioner's 1974 tax return, being questioned on constitutional grounds - - the same as in 1973 - - was handled differently. Respondent sent petitioner an assessment for the tax, later admitted as being an "improper assessment". It was erroneous (1) as to its mathematical computations, and (2) as to its caption. (Joseph W. and Doris M. Smith, Jr.) Said assessment claimed a "correction to arithmetic" - - this a fraud. Section 6213(b) of the I.R.C. of 1954 provides that on mathematical errors the assessment serves

as a Notice of Deficiency. (for respondent's detailed explanation, see transcript, App.11-13)

Because of an IRS audit of petitioner's 1974 taxes, respondent was obliged to issue a Notice of Deficiency on Aug. 20, 1976, along with the 1973 Notice, to accommodate an addition to tax not already assessed. The Notice contained a negligence penalty.

Petitioner filed timely petitions for both tax years in the United States Tax Court on October 28, 1976, this a provision allowed when a Notice of Deficiency is issued. In response to the 1974 tax assessment, (the fraud) petitioner filed a Motion to Dismiss respondent's case for 1974 on October 20, 1977.

The Tax Court, in a hearing on the Motion on November 23, 1977, while taking note that the assessment was erroneous,

did not dismiss the case. (See transcript App. 14) Consequently, at the Tax Court trial on June 19, 1978, respondent amended what he termed an "improper assessment", partially abating it under the pretext: "To allow petitioner to argue the merits of a credit claimed against tax as a protest against the taxing and spending policies of the United States Government." (Actually, the assessment was abated only in the part which was an erroneous miscalculation by respondent and a small income tax, but not as to a large self-employment tax.)

The Tax Court received the respondent's amended assessment as filed. On petitioner's question as to the assessment being void, the Court's contention: "It may be too high, it may be too low, . . . but it's not void." The Court: "The so-called 'mathematical error' (the fraud) is not subject to appeal in this Court, but if it's not a mathematical error, you (petitioner) can go ahead and

challenge the right to make the assessment in the District Court." (See transcript, App.6-7)

In reference to respondent's continual shifting of the amount of tax petitioner owed, even during the trial, (because of the fraud) the Tax Court waved the 1974 negligence penalty, noting: "I think that somebody's been negligent on the other side here, too." (transcript App. 7)

In reference to respondent's negligence, (fraudulence) the United States Court of Appeals, in its memorandum noted: "Corrected miscalculations by our creditors are annoyances, but not legally cognizable injuries normally." And, with reference to the assessment, the Court: "Smith owed the tax and does not show that any mathematical error exists. (Apparent meaning that no fraud exists.) No right of Smith has been violated."

Respondent's alleged total tax liability varied, but is was around $2,600 for the tax years of 1973 and 1974 combined. By crediting and/or "freezing" petitioner's overpayment of taxes for 1975 and two refunds due, one for 1975 and the other for 1976, these refunds due to net operating losses, respondent held in excess of $6,300 of petitioner's property, refusing to pay. (App. 35-36)

Petitioner filed for the two net operating loss refunds in April of 1977. The refund applicable to a 1976 net operating loss, carried back to 1973, causing a tax refund of $1,695.50, was credited to petitioner's alleged tax liabilities. The 1975 net operating loss, carried back to 1972, causing a tax refund of $4,591, was "Frozen".

On April 6, 1979, a Treasury check for $5,592.09 was made out to Joseph W. Smith, Jr.

and mailed to petitioner. Since there was no explanation ever given, petitioner logically assumed the check was to cover the "frozen" 1975 tax refund, plus interest.

On April 13, 1979, a Treasury check was made out to Joseph W., Jr. and Doris M. Smith for $929.04 and mailed to petitioner. No explanation was given. Petitioner can only assume this check was to cover IRS errors, all because of an IRS conspiracy to defraud petitioner, which left a trail of inextricable bookkeeping problems from May of 1975 until the mailing of the check.

The United States District Courts Sanctions

"A" The "So-called Mathematical Error":

Pursuant to 28 U.S.C. Section 1346, petitioner filed suits in two U.S. District Courts. (App. 17-30) This code section provides, as follows:

> "any civil action against the United states for the recovery of any internal-revenue tax alleged to have been erroniously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . ."

shall be within the original jurisdiction of the United States District Court.

"B" 26 U.S.C. Sections 6402(a) and 6512(a) Indiscretions

These sections of the Code of 1954 were the authority presented to the Court for crediting the overpayment of taxes and the refund. Section 6402(a) provides, as a general rule, in the case of overpayment of taxes, respondent may credit the amount of such overpayment against any liability of taxes then due. Section 6512(a) provides that no credit or refund of income tax for the same taxable year shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court when a petition has been entered in the Tax Court.

The overpayment was for 1975, not a tax year in litigation. The refunds were for 1975 and 1976, tax years not in litigation before the Tax Court.

Both of the complaints before the district Courts were dismissed because petitioner's case was already before the Tax Court. (See Yannicelli v. Nash 354 F Supp 143 (1973) and Botta v. Scanlon, 288 F 2d 504, 506 (1961) (App. 54-57)

Petitioner's two suits generally followed the following provisions of section 1346:

> "In action to restrain collection of federal taxes, where complaint alleged that the taxes could not be legally assessed against plaintiff and that property rights of plaintiff would be utterly destroyed if compelled to pay and that a suit to recover the taxes would not provide adequate remedy, complaint was not subject to motion to dismiss . . ."

Due to the erroneous District Court dismissals, at the Tax Court hearing on June 19, 1978, that Court allowed a credited

refund for the 1975 tax overpayment to be a consideration in its finding. Also, a 1975 net operating carryback loss refund credited to the 1974 tax liability was made part of the consideration in its findings. But the net operating carryback loss refund "frozen", or the same as credited for two years, an amount in excess of $4,500, was not allowed as a consideration. (App.8-9)

A notice of appeal to the Court of Appeals was timely filed on December 11, 1978. The Tax Court's decision was affirmed on December 23, 1980. (App.31-34)

Improper Tax Lien:

Pursuant to the Tax Court decision, petitioner received a tax bill on June 11, 1979 for $1,855.89 on 1973 taxes. At the same time, petitioner received a tax bill for unpaid 1974 taxes of $831.34.

Petitioner made several attempts to have the extraordinary assessment clarified.

No explanation was ever offered. Then a revenue agent, as before, started demanding payment of the erroneous assessments, as far as anyone could possibly know. Obviously, petitioner would do no more than refuse to pay a tax bill he thought to be in error.

Nothing further took place until petitioner sold his residence in September 1980. When petitioner went to the title company to pick up the proceeds from the sale, he found to his surprise a deduction of $2,566.54 to satisfy a United States tax lien. (App.62-63)

Petitioner filed a claim for refund on November 9, 1980. There has been no further word from the respondent since that filing.

REASONS FOR GRANTING THE WRIT

Urgent Need for Review:

When the ends of the law: a higher law in existence even before governments, a law having higher attributes than current fiscal policies, a law that has not been recognized, defined, nor attained in recent years; that is, when there has been no limit or legally prohibiting edict made to excesses in taxing and spending; and, when there has been no endeavor to secure those interests that are within a still undefined limit - - and to which this case addresses itself - - it would seem to be time enough to be heard in this Court.

The urgency lies in the fact that there has been a progressively growing shift in emphasis away from property rights, and to their almost complete replacement, other personal rights as the primary focus of the law's concern.

An argument based on the proposition that power to tax and spend includes power to discharge a moral obligation may be conceded, and has been declared legal by this Court. But an argument that Congress may therefore create a scheme, which itself causes prohibited deprivations of rights to the people - - under the pretext of doing what it considers its honorable duty - - which scheme may then tax unlimitedly to meet those "moral obligations" - - would appear by any reasonable standard of values simply a juggling of honor with chicanery. An abuse of the trust the people placed in the Federal Government fits better than honorable duty.

As experience has taught us, and as court sanctioned social programs have demonstrated, taxpayers property has become a means to a transfer of personal rights, the end result of which has ceased to make any sense or justice.

This case has been an example of the difficulty of making a determination of the issues contained herein. Today society and the individual are competing, and the lower courts virtually decide the question in advance, however valid the question may be, when property right is up against competing social interests.

Petitioner prays, due to these circumstances, that recognition be given to the problem and the danger existing to our heritage as free men being eroded away by reckless congressional taxing and spending policies; and connected inexorably and irreconcilably, tyrannical tax collection measures meant to discourage any resistence against confiscatory policies, which might otherwise be the case.

To find the remedy, we must look to our founding fathers, who, with the realization that the real enemy of democracy is

is a monopoly of political power, provided a balance in the Constitution - - a public sector strong enough to check abuses in the private sector, and a private sector strong enough to check abuses in the public sector.

The "New Deal", with all its good intentions, motivated this Court to redetermine the rightful role of the Federal Government. This is not to say that the change was not needed, but it was the beginning of the problems we are faced with today. "While it isn't written in the Constitution", declared FDR in 1933, "nevertheless, it is the inherent duty of the Federal Government to keep its citizens from starvation." In 1937, FDR said: "The balance of power between the three great branches of the Federal Government, has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. We have reached the

point", he declared, "where we must take action to save the Constitution from the Court." No doubt true, in light of the needs of that day, but from the ensuing spate of social spending, and the resulting demise, it appears somewhat ironic that Justice Brandeis and some of his brothers would reason: "property is only a means. It has been a frequent error of our court that they have made the means an end."

While FDR's "New Deal" might be compared to a concerned physician administering a narcotic for acute pain, as distinguished, present day "dope pushers" and "prostitutes" under the guise of tax to perform an honorable duty, are praying on human weakness.

Property Rights, A Higher Law in Question:

This Court's test as to a right is whether the right at issue is "of the very essence of a scheme of ordered liberty", by reason that neither liberty nor justice would exist if such a right were sacrificed.

Whereas, it is legal to tax unequally to defray government expenses, the legality begins to crumble, and is distinguishable, when applying the mathematics to unequal taxation to transfer 75% of the tax collected to other citizens. When the element of redistribution of the nation's income is introduced to this extent, and the exaction causes a deprivation of rights to the taxpayer, an unanswered, heretofore non-existent constitutional question arises, which has no relation to any wisdom or economic theory put into place by our lawmakers.

"A tax to promote the general welfare cannot be rested out of its setting and legalized by ignoring its purpose as the mere instrumentality for bringing about a desired end." U.S. v. Butler, 297 U.S. 1,61 (1936)

Law is reason codified by experience;

and the experience of property rights, having been substantially adversely affected, is proving conclusively today to be a very bad experience for the nation.

Cooley's Constitutional Limitations identified due process with the doctrine of vested rights drawn from natural law. Thus, where under the natural law, petitioner prays, is there a standard for free men set by taking from petitioner in such excess that, after paying the exaction forced upon him, he is unable to provide for his own basic needs; and, by handing over the fruits of his labor, others are provided with the same as petitioner's basic needs?

Justice Douglas maintained that the Ninth Amendment is as a moon partially eclipsed by other parts of the Constitution. His "penumbra theory" has won assent of the majority of this Court. Specific guarantees

in the Bill of Rights have penumbras, said Justice Douglas. "Various guarantees create zones of privacy." Griswald v. Conn., 381 U.S. 479, 484, 485 (1965)

And this Court holds: "it is elementary that tax laws are to be interpreted liberally in favor of taxpayers and the words defining things to be taxed may not be extended beyond their clear import . . . And this Court likewise recognized the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v. Nut Margarine Co., 284 U.S. 498,508, 509 (1932)

We should not accept the explanation that we are at issue over simply an elucidation of grants in aid, but must regard the present redistribution of income as a tacit declaration of a new purpose; not an explanation of an old one. To quote this Court in Swab v. Doyle, 258 U.S., 529 (1922): "It is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it."

What we actually are dealing with here is a revisionist scheme gone awry, an unconstitutional explosion of taxing and spending, which has all but consumed the very essence of our most basic fundamental law. Raw, uncontrolled political power is what we have.

By reason of man's lust for power, there has long been established a code of ethics incorporated into the law of the land which lays down principles on the use and abuse of all things, and this law judges the consti-

tutionality of our statutes. The society which refuses to recognize as legally cognizable this higher law is doomed to oblivion, a fact of history.

Abstract fair play is a fundamental part of the law. When an excess occurs, such as the one described herein, a higher law involved is deserving of answer. The law at stake is the cornerstone of our Republic. Petitioner hopes to preserve the law through this case.

These things petitioner brings to this Court's attention were well known by our founding fathers. John Adam's answer to the proposition that property is only a means to meet the needs of society: "The moment the idea is admitted into society that property is not as sacred as the laws of God . . anarchy and tyranny commence."

Life, liberty, and property are all equal in weight before the law. How can one today lay the three side by side and not see clearly an inequity of rights imposed against the property rights of taxpayers caused by capricious taxing and spending?

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably implied, are reserved to the States or the people. In the often referred to case of McCulloch v. Maryland, 4 Wheat. 316,421, a limitation was placed on Congress based on three theories of law to which this Court has remained loyal: (1) The Constitution is for the benefit of the people, not the government or the power structure; (2) it was intended to endure, consequently, to be flexible to the needs of society as they arise; and (3) with a limitation placed on the National

Government as one of enumerated powers and sovereign only to those powers, this confirmed in U.S. v. Butler 297 U.S. 1 (1936) App.51-54)

The Marshall Court construed our basic document to embrace "all means which are appropriate" to carry out "the legitimate ends" of the Constitution, unless forbidden by "the letter and the spirit of the Constitution".

"Higher law" holds that social spending firstly, not lastly, must be limited to a taxing and spending policy which is prudent to the rights of taxpayers. This is the only law which is a must in a free society.

To "save the Constitution", petitioner, in equity before the law, specifically charges that Congress, without authority of the people or this Court, has tipped the scales of justice far too much to the side of income transfers, and demonstrates no pro-

pensity to change its capricious ways, harvesting every tax year an ever increasing proportion of the nation's income.

The enormity of the offense against the grant of power the people left in trust to Congress gives those who suffer, to the point that their own economic existence is threatened, a personal stake in the outcome of a suit. It demonstrates clearly a connection of taxpayer status with the precise nature of the alleged constitutional infringement.

The agrieved party, therefore, may rightfully, if there is any fairness left, be heard in this Court on the grounds that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of power, this confirmed in Flast v. Cohen 392 U.S., 83 (1968). (App.47-51)

Subordinated Taxpayers, a Minority Interest:

The great principles established in the past generation applicable to "equal justice under the law" and "distributive justice" apply equally to taxpayers. Recognition should be given to taxpayers today as a minority interest.

A.Gary Shilling, an authoritative and often quoted economist, recently applying Department of Commerce figures, found that fifty-four percent of the population now depends on government spending for "a significant part of their income". This percentage figure, one can be sure, does not come close to reflecting the interests of benefactors of big government who lobby congressional representatives daily for a continuance of ever bigger income redistribution policies, which policies add to special interest incomes.

Petitioner, being a minority interest today, triggers an argument, which has heretofore not been the case. Petitioner is not arguing over "unwise" legislation which brings about high taxation. Congress is not limited in its wisdom to pass laws out of conscience and compassion. But an illegitimate metamorphosization of our fundamental law, which is the case in point - - on this Justice Jackson once declared:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the visissitudes of political controversy, to place them beyond the reach of majorities and officials and extablish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Va. State Board of Education v. Barnette, 319 U.S. 624, 638 (1943)

The problem, Justice Douglas once observed, is that we pat our backs far too much over the respect we show for individual liberties. The courts, in glowing terms,

compliment themselves; but, unless one has a militant civil-rights group to back him, the courts are too prone to plow the individual's case under, said Douglas.

Whereas, our founding fathers envisioned and put into place a system of government under which individual liberties reigned supreme, the original autonomous state of the individual has been subordinated in favor of group rights, out of which various single interest groups, having formed "iron triangles of power", divide and conquer the greater goals of the nation, and fundamental law along the way.

"Iron triangles" link executive bureaus, congressional committees and special interest groups, says Harvard Professor of Government, Hugh Heclo. Networks of people who regard each other as knowledgeable form public policy - - "though rarely in any controlled, well-organized way", he said. "The problems far outweigh the advantages."

Some of the Facts Demonstrating the Bad Faith of Congress:

Former Member of Congress, Martha W. Griffiths, (Dem.) of Michigan, a 20 year veteran of Congress and chairman of the Joint Senate-House Fiscal Policy Subcommitte, declared to the news media: "We have 10 legislative committees and 11 executive departments running entrenched social programs without anyone capable of seeing the overall picture." Said Mrs. Griffiths: "at the present time, (1974) middle-class persons are paying (through taxes) for better health care for the poor than they can afford for themseles. Legislators like myself, military men, etcetra, all have generous pension plans which cannot suffer default, due to federal guarantees. But the private citizen is still vulnerable. In America we virtually worship fairness, but too often we have not been fair to our most deserving citizens." She predicted

correctly in 1974 that: "nothing much will be done for them in the future, just as nothing much has been done in the past."

The needs for new social programs are constantly being drummed to the public, but they are not offered as replacements for older, less necessary programs. With every new crises, new demands are made on taxpayers, but Congress demands nothing of itself to balance taxing and spending with legitimate needs. And, why should Congress as long as people want things and politicians want to be re-elected?

Once on the books as law, each new program becomes an institution with its voting constituency. Needs change, but a benefactor constituency never changes. This is the very reason there are powers Congress does not have, and never should.

Former Attorney General Benjamin Civilette told a Senate Budget Committee: "Whenever

we look deeply with focused investigation, significant fraud and abuse will be detected."

There is a minority of citizens, of whom petitioner is one, who are great losers in the survival instincts of Congress' members. U.S. New & World Report statistics derived from Department of Commerce figures show that during the past 25 years retired federal workers have gained 125.4 percent in pay, and Social Security recipients, 79.9 percent. These and millions of others who pay little or no tax are indexed to inflation. The taxpayer is indexed also, the wrong way. As inflation goes up, so does the percentage he pays in tax. The net result is that inflation, which the Federal Government is behind, works to give the Federal Government powers it never had or should have.

The demands of organized labor, for them. has offset the harm of inflation. And organized labor consists of a huge

voting block. Looking at who composes the well entrenched power structure, those above mentioned voting constituencies, it is not difficult to see the exclusive federation, formed democratically, of course, but also leaving, as a result, a minority group, of which petitioner is a part, with a de facto deprivation of rights.

We are all-too-familiar with the euphemisms which extole our virtues; but what about those who are not compensated for high taxation and inflation - - the unorganized workers, the shopkeepers and other small businesses; what about those who don't fall into the category of old, sick, rich, poor, tax evaders, or organized - - those taxpayers who make up the backbone of America, asking for and receiving, as Martha Griffiths said, "nothing much".

Are we, the most deserving of all citizens not the victims of unscrupulous

taxation without representation? And, is it not we, who have had thrusted upon us this responsibility - - we who have the right under "due process" principles to have a meaningful hearing in a meaningful place - - to redefine the rightful role of respondent?

The Responsibility of the Judiciary:

It is fact that the Federal Budget is out of control with built in preferences. It is fact that seventy-five percent of the budget goes into an income transfer of which petitioner is not a part. Does this not even hint there is an ulterior motive to accomplish something that revenue words on their face do not say?

"It will be a sad day", said Justice Jackson when speaking of questionable revenue measures, "if the good will of the people toward their taxing system is fritered away in efforts to accomplish by taxation moral reforms that cannot be accom-

plished by direct legislation." U.S. v. Kahriger, 345 U.S. 22 (1953) (App.58-60)

If it is the basic law we are going to be concerned with here, and not a policy decision, true political and civil rights, being universally measurable, can make workable laws, which can be enforced with justice in our courts.

And some courts do recognize: "generally 'due process' or its equivalent, 'the law of the land' is not a guarantee that every court ruling shall be correct, but it is a guarantee that the fundamental principles of justice shall not be violated." State v. Rossi 43 A 2d 323, 71 RI 284.

The above assertion fits petitioner's case before the Court of Appeals. More than an error, the court denied "due process" in brushing petitioner's case aside. Using Brushaber as its excuse, the very case that petitioner used as his right to be

heard, is extraordinary neglect to its judicial function, in petitioner's view. (App.32-34)

In his opening remarks in the Statement of the Case, petitioner showed that in his petition to the Tax Court he quoted almost verbatim Chief Justice White's remarks as a reason for judicial review of the income tax law. Justice White, speaking for the Court in Brushaber, supra, 240 U.S. 1,36 S. Ct. 236, 60 L.E. 493, pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise a case, such as petitioner's, where the tax is no more than a confiscation of property - - a taking under the guise of tax. Although this Court has never rejected this maxim, it has allowed an erosion of property rights to go on and on without a word one way or the other. Neither has the court below changed the course.

Petitioner will concede to the Court of Appeals as follows: "2. Smith

contends the Tax Court denied him a hearing on his due process claim. Smith is in error; the Tax Court heard him and rejected his claim." The Tax Court, in its own words, considered petitioner's claim "two minutes".

To quote the Court of Appeals "Memorandum" further: (App. 32-33)

"3. Smith insists that the Commissioner violated 26 U.S.C. Section 7605(b). There is no evidence to support this claim in the record and it does not appear to have been raised in the Tax Court."

From the Tax Court Transcript of June 19, 1978: (p. 15, lines 12-18)
MR. SMITH: "What I want to argue about in this Court is not that. (constitutional issue) What I want to argue about is the collection and - - the assessment and collection process and the illegal manner in which respondent has handled my tax. Now that - - (interrupted)

THE COURT: "I find nothing illegal in the respondent's handling of your tax . . ."
(p. 16, lines 3-10)
THE COURT: "I see you made a statement that she (petitioner's wife) gave them (IRS) information without your knowledge or consent, but that's neither here nor there."
MR. SMITH: "No, that's not the case, sir. That isn't the case at all. I have a right to be present at an audit of my return, is that not correct?"
THE COURT: "once they audited hers (the 1974 tax records) they didn't need to audit yours."
MR. SMITH: "You mean to tell me - - (interrupted)

It was upon this interruption that petitioner was about to relate, among other questionable acts of respondent, the re-examination of his 1973 return against his will and request. The facts of the re-

examination are explained in "IRS Conspiracy". The question of "the illegal manner in which respondent has handled my tax" was brought up in the Tax Court, adding as well, the dismissals in two District Courts, which denied petitioner his right to be heard on the subject - - all of this together questions whether petitioner ever had a chance to start with. All of this was before the Court of Appeals. (App.17-30)

No consideration was given in the Court of Appeals to the erroneous crediting of refunds or the injury caused to petitioner by the "improper assessment" (the fraud) and credits thereto. (items 4 and 5 in the Court's "Memorandum") (App.33)

Petitioner will concede to the Court's finding in item "6" (App.33)

Petitioner denies item "7" of the Court's "Memorandum". This Court is referred to "IRS Conspiracy" discussed later. (App.33-34)

Petitioner neither denies nor admits to item "8" of the Court's "Memorandum". This Court is referred to "IRS Conspiracy" later discussed.

Petitioner questions the propriety in Court's ruling in item "9" of its "Memorandum". (App.34) As to the question of the 20% deduction on petitioner's 1973 tax return, the Tax Court ruled the negligence penalty was proper in that petitioner took an "arbitrary credit". Said the Court: "It shows a willful disregard for rules and regulations." (App.7)

Petitioner alleges there is nothing in the rules and regulations that allows a penalty for taking an arbitrary credit in this case. Petitioner conformed to the only rules and regulations applicable. Those rules are as follows:

Privacy Act Notice on tax return:

> "Our legal right to ask for information is IRC sections 6001 and 6011 and their regulations. They say that you must file a return or statement with us for any tax you are liable for . . . This is so we know who you are, and can process your return and papers."
>
> "You must fill in all parts of the tax form that apply to you."

Respondent determined that because petitioner did not carry forward to the first page his self-employment tax, that constituted a mathematical error.

Petitioner filled in all parts of the return correctly as to his income and authorized deductions. The fact that he took other deductions, which he explained in an attached schedule, is no valid reason to claim a mathematical error was made. The fact that petitioner did or did not carry figures forward from one schedule to another is no reason to claim petitioner made a mathematical error.

This Court is referred to the following case authorities:

Thompson v. U.S. 308 F. 2d 634 (1962) (App.46); Flast v. Cohen 392 U.S. 83 (1968) (App.47-51); U.S. v. Butler, 297 U.S. 1 (1936) (App.51-54); Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (App.57); Linder v. U.S., 268 U.S. 5,17 (App.57-58); U.S. v. Kahriger, 345 U.S. 22 (1973) (App.58-60)

Internal Revenue Service Conspiracy:

"A" Injury to Petitioner Through Devious Collection Procedure

Notwithstanding the excessive exaction forced on petitioner under the guise of tax, tied to this wrong was a second inevitable wrong - - police state tactics. Respondent seriously injured petitioner in a wilfully concocted and executed fraud.

The relevant facts are as follows:

The Intimidation Tool - Since his action of challenging the excessiveness of the tax, petitioner has been subjected to frequent threats of seizing his property. (respondent's letter, App. 41-42) During a hard time for petitioner when he had no income from any source, his rightful refunds he needed badly to cover his living costs were wrongfully credited, the respondent knowingly holding the refunds without authority. Mile long lines at the time, "snow birds" from the North, patiently waited to collect petitioner's refunds in the form of food stamps in Miami.

IRS Contrivances to Defraud - One of the tools used was an admittedly erroneous assessment, which, among other things, was in excess of petitioner's alleged tax liability. Another tool was the crediting of refunds and overpayments. The credits amounted to a far greater

amount than the total alleged tax, the tax already enjoined from collection pending the Tax Court trial. Long befoe the trial, respondent had collected far more than the alleged tax through "freezing" refunds and still was threatening petitioner with numerous demand notices.

Petitioner challenged respondent in court twice over this fraud, but the respondent deviously succeeded in getting petitioner's two U.S. District Court cases dismissed. Respondent circumvented the above mentioned facts, and to the Court's undeniable error, hoodwinked the Court by focusing on only one point, the least of all points -- the treatment of a $215 overpayment of taxes for 1975. The respondent simply ignored the rest of the complaint. The Court, obviously failing to read petitioner's complaint, Concurred with respondent's slight of hand.

To the Court's further discredit, the argument respondent used to credit the 1975 tax overpayment was that the 1975 overpayment was already paid to petitioner after the fact that it was credited to 1974 taxes already before the Tax Court. Respondent used as its authority section 6512(a) of the Int. Rev. Code. (App.60-61)

The authority utilized to credit the overpayment and one of the refunds (the other refund was "frozen") was Section 6402 of the Int. Rev. Code. (App.60) This regu'ation provides, in part, that the amount of overpayment shall be credited against income tax then due, this not being the case here; and in part, that the credit of the overpayment can only be "properly credited in absense of proof that such assessment was erroneous", this not the case here. Nevertheless, the overpayments and refunds were either credited or "frozen", take your

choice (App.35-36)

Even though it was "clear under no circumstances could the Government ultimately prevail", as was the case in Enochs v. Williams Packing Co., 370 U.S. 1,7 (1962), a prohibition against dismissal, erroneously, two U.S. District Courts dismissed petitioner's complaints. (App. 17-30)

"B" Coercion and Deceit in the Auditing and Assessment Process

As the record indicates, the following took place:

In October 1974, respondent unnecessarily put petitioner through a microscopic examination of his 1973 records at petitioner's office in Lewisville, Texas. The reason given was petitioner's "Tax Protest". (see auditor's memo, verbatim. (App. 44-45)

The examining officer, after completing the audit, told petitioner he had failed to report $5,000 in income. Petitioner knew the accusation was false. Thus, petitioner invited respondent to take the issue to court.

Instead of accepting the challenge, respondent contacted petitioner on March 20, 1975, asking for a re-examination of the same records. Petitioner refused to grant permission, his right pursuant to the provision of 26 U.S.C. section 7605(b).

Petitioner was not allowed to argue this point in the Tax Court. In Respondent's Answers To Petitioner's Interrogatories of March 3, 1978 (App. 61), under item "5": "If you are requesting a section of the I. R.C. dealing with a second examination of a taxpayer's books, Section 7605(b) deals with this.

A copy of this section is attached." This demonstrates that petitioner had it in his mind to bring up the subject before the Tax Court, but was interrupted.

In a second phone conversation, (App. 43), petitioner told respondent he was moving to Florida. Pursuant to IRS regulations (IRS Pub. 586A, Section VI) petitioner is allowed to transfer his case. Respondent told petitioner, "we don't work that way". (last line of respondent's note App.43-44) Petitioner told respondent he did not want his wife brought into the argument. Petitioner told respondent to deal with him only on the matter. The "we don't work that way" was followed by: We will continue the examination with your wife. (letter from respondent to Senator Lawton Chiles, (App.39-40)

Upon the knowledge that petitioner was leaving Dallas permanently, respondent on or about March 20, 1975 "advised" petitioner's

wife. Respondent knew that petitioner had made, what respondent terms "groundless deductions" again on his 1974 joint return challenging again the taxing and spending policies. (See respondent's note App. 43, 2nd para.)

Petitioner's wife took respondent's "advice" and did not sign their already made out joint return for 1974, this fact being unknown to petitioner, as his wife had never mentioned any reservation on signing that return. She did sign the 1973 return, which also had a deduction on constitutional grounds.

Instead of signing the 1974 return, she made out her own separate return for 1974, with no constitutional deduction, paying her part of the tax. She sent the joint return in with only petitioner's signature. A letter was enclosed with the joint return explaining that the joint return was to be treated as petitioner's

separate return. This was done on the "advice" of respondent, who did not advise petitioner of what had been done. (App. 45) This all appears to petitioner to be inappropriate meddling in private matters, and willful concealment from one of the interested parties - - not the rightful role of the Federal Government.

Upon receipt of petitioner's separate, or joint return, whichever the case may be, the Service Center treated it as a joint return. Noting the deductions, and no payment of taxes, the Service Center issued a fraudulent assessment captioned: "Joseph W. and Doris M. Smith, Jr. Several changes were made on the return - - those erroneous, too.

The assessment was sent to both petitioner in Miami, Florida and his wife in Lewisville, Texas on May 8, 1975. This assessment remained in force with the knowledge it was erroneous. (See res-

pondent's letter and note c.c. to wife. (App. 41-42) It is common knowledge, according to the Tax Court, that IRS routinely resorts to these erroneous assessments, knowingly. It can be only for one reason: to collect more revenue.

Unknown to petitioner, respondent did re-examine petitioner's 1973 tax records with his wife in violation of section 7605(b) of the Code. Petitioner questions the right of respondent to ignore either party when examining the records on a taxable year where a joint return is filed.

Thus, respondent did further intrude upon petitioner's privacy in that illegal act. "Where on initial visit to taxpayer's place of business, revenue agent was unable to reconcile gross receipts with reported bank deposits," as was the case

here, "he (petitioner) could have resisted agent's proposed visits and forced the government to resort to subpoena." U.S. v. House, 524 F 2d 1035, 1043 (1976) Petitioner was not given this opportunity.

This Court has noted that courts should intervene when taxpayers are able to show that Internal Revenue agents seeking further information by inspection of books have abused their discretion in wielding extensive powers granted them by the Int. Rev. Code. U.S. v. Crespo 281 F Supp 928 (1968).

The demise here is that respondent willfully kept petitioner out of the case, effectively discrediting petitioner, and at the same time gaining the confidence of petitioner's wife - - using her to gain entrance and audit petitioner's 1974 records. Respondent split the income. Corrections were made as to deductions. Respondent actually made out a new corrected return - - all done without

petitioner's knowledge or consent. The obvious idea was that if petitioner was not going to co-operate and pay his taxes, respondent would see that he did.

In July 1975, petitioner returned to Dallas from Florida and discovered all that had taken place in his absence. Respondent, at that time, under the pretext of complying with the law, audited petitioner, who had none of the records for the year which was being audited, the records being in wife's possession. She had a restraining order prohibiting petitioner from having the records.

During this encounter, petitioner presented the erroneous assessment he had received in Florida, on which by this time he had been threatened with forced collection. Respondent assured petitioner there was nothing to be concerned about. The assessment would be voided and a Notice of Deficiency would be issued to petitioner.

But, IRS decided to play the game differently. Petitioner returned to Florida in November 1975. Immediately, petitioner was called into the local office in West Palm Beach and told he had two choices: either pay the erroneous assessment at once or have his property seized. Petitioner was told that he was one of those "Fifth Amendment freaks" and he wasn't going to beat the income tax laws. Petitioner refused to pay. Nothing was done until June 1976. (see respondent's letter, App.41-42)

On June 22, 1976, respondent sent a letter to petitioner offering to abate the assessment, but not to void it. Petitioner rejected the offer. The assessment was left to stand and did remain in force, uncollected, but used as the instrument to credit petitioner's overpayment and refunds. It remained in force until the Tax Court trial on June 19, 1978 at which time it was abated.

CONCLUSION

Respondent claims the power to tax is unlimited. The United States Tax Court, without qualification, concurred with that opinion and was affirmed in its opinion by the United States Court of Appeals.

Under the extraordinary circumstances presented herein - - the minority taxpayer interests being ignored in favor of a majority - - who, this Court is asked, other than the aggrieved party is the proper party to challenge the question presented here? There is no countervailing force other than the Constitution itself as the remedy for the problem.

Petitioner has placed before this Court this question: the exaction forced upon him disassociates taxing and spending from unrevokable and non-conferrable personal rights. Respondent, in order to work its will on petitioner, resorted to conspiracy and fraud

to circumvent the law.

Wherefore, petitioner respectfully requests that the unfair exaction, a de facto deprivation of rights, a confiscation of property collected illegally, be enjoined from collection permanently.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing PETITION FOR WRIT OF CERTIORARI with APPENDIX have been served by mail to each of the following parties, and addressed as follows:

Three (3) copies to: Commissioner of Internal Revenue
1111 Constitution Ave. N.W.
Washington, D.C. 20530

Three (3) copies to: Solicitor General
Department of Justice
Washington, D.C. 20530